

INFORMATION PERTAINING TO

INVESTIGATING WATER RIGHT COMPLAINTS

IN CALIFORNIA

FEBRUARY 2005

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

INVESTIGATING WATER RIGHT COMPLAINTS

GENERAL

This pamphlet provides information about water rights in California and describes the process for investigating complaints relating to water rights.

California has a limited supply of water available in its rivers, lakes and streams – particularly during dry years. The growing population and development throughout the state generate increasing demand for this limited resource. As a result, disputes often arise over the use of water.

The courts and legislature have developed rules governing the use of water and the related water rights. The State Water Resources Control Board (SWRCB) has been designated by the legislature as the state agency with the primary responsibility for administering California's water right program. As described below, the SWRCB has developed a process for investigating complaints relating to water rights. These investigations are conducted by staff in the Division of Water Rights (Division).

TYPES OF WATER RIGHTS

California has a unique and complex system of water rights. The State recognizes a number of different types of water rights. The two most common types are *riparian* and *appropriative*.

Riparian Water Rights Although the legislature has enacted few laws relating to riparian rights, several court decisions have resulted in the following general rules:

- A property owner may have a riparian water right when a stream flows through the property or when the property borders a stream or lake.
- Riparian water right holders may only divert a share of the natural flow of water in the stream. The natural streamflow is the flow that occurs in a watercourse due to accretions from rainfall, snowmelt, springs and rising groundwater. To the extent that flow in its natural state reaches or flows through their property, riparian water right holders have a proportional right, based on need, to the use of the natural flow. In times of water shortage, riparian diverters must share available natural flow.
- A riparian right does not allow diversion of water that is foreign to the stream source. Water imported by water districts, water that is stored and subsequently released later in time into the system from upstream dams, or irrigation runoff from well water applied to upstream lands is not available under a riparian claim of right.
- Water diverted under claim of riparian right may only be used on the parcel of land that abuts the stream, and then only on that portion of the parcel that drains back into the stream.
- Riparian rights are not lost by nonuse of the water.
- Water may not be stored during one season for use in a later season. However, water may be retained for strictly "*regulatory*" purposes. "*Regulation*" of water means the direct diversion of water to a tank or reservoir in order that the water may be put to use shortly thereafter at a rate larger than the rate at which it could have been diverted continuously from its source.

- The riparian diverter is subject to the doctrine of reasonable use, which limits the use of water to that quantity reasonably required for beneficial purposes.

Appropriative Water Rights Individuals who do not have riparian property or wish to seasonally store water can obtain appropriative water rights for the direct diversion and/or storage of water. Appropriative water rights are governed by the principle of "*first in time, first in right*"; the earlier the right is acquired, the higher the priority associated with that right. The priority of a water right is established on the date that an application to appropriate water is accepted by the Division. An appropriative water right must be maintained by continuous beneficial use. If water is not used for five consecutive years, the right may be reduced or lost.

The modern appropriative water right process, administered by the SWRCB, came into being December 19, 1914 by passage of the Water Commission Act by the California Legislature. Prior to that date, an individual could obtain a "pre-1914" appropriative water right simply by putting the water to beneficial use. After 1872, an earlier priority could also be obtained by filing a notice with the County Recorder and then diligently constructing a project and putting the water to beneficial use. Since 1914, an appropriative water right can only be obtained from the SWRCB through the issuance of a permit or license. Appropriative water rights issued by the SWRCB contain specific conditions governing the use of the water, including:

- the quantity of water which may be diverted;
- the time of year during which the diversion may occur;
- the point that the water is diverted from the stream;
- the place where the water is used; and
- the purpose of use.

Other Types Of Water Rights There are several other types of water rights in California. Individuals may contract with a water district or other supplier for water and thus have a contractual water right. However, in order for the contract to provide a legitimate basis of right, the contractor must possess a valid water right that authorizes diversion and use in accordance with terms and conditions of the water right. Groundwater may be pumped from a well, or water may be collected from a spring, which does not naturally flow off of the particular parcel. In limited instances, individuals may acquire prescriptive water rights against other parties. However, prescriptive rights against other parties do not eliminate the need to file for an appropriative water right with the SWRCB. Prescriptive rights are discussed in more detail in a booklet titled, General Information Pertaining to Water Rights in California, which can be obtained free from the Division or can be found on the Internet at: www.waterrights.ca.gov

AUTHORITY OF THE SWRCB

The SWRCB has the authority to investigate the following types of complaints:

- **Violation of Permit/License Terms** – A complaint may be filed if the holder of a water right permit or license issued by the SWRCB is not complying with the terms and conditions of the permit or license. The Division will investigate the allegations to insure that the water user complies with all terms and conditions of the water right.
- **Unauthorized Diversion** – A complaint may be filed if a water user does not appear to have a valid water right. The Division will investigate to determine whether the SWRCB has issued a permit or license, or whether the water user may have a riparian, pre-1914, or other type of water right. If Division staff determines that the water user does not have a valid water right, action will be taken to insure that a valid right is acquired or that the person stops diverting the water.

- **Waste or Unreasonable Use** – The California Constitution requires that all waters of the State be put to reasonable and beneficial use. It is illegal to waste water, to divert water for non-beneficial or unreasonable uses, or to use an unreasonable method of diversion. If one or more of these actions is occurring and causing injury to legal water users, or is causing an adverse impact to instream uses of water, the Division may accept and investigate a complaint. The Division will look at each diversion on a case-by-case basis to determine whether the practices are unreasonable or non-beneficial and what type of action should be taken.
- **Public Trust** – The SWRCB has a responsibility to protect the public trust, i.e. the public's right to the use of the State's waters for instream purposes such as recreation, navigation, and fish and wildlife. The Division generally will investigate complaints, which allege that water is being diverted in a manner inconsistent with public trust uses. The concept of public trust relating to water rights, however, generally involves complex legal and institutional relationships. Therefore, an investigation of a public trust complaint could require considerable time.

In some cases, the SWRCB may decide not to process a complaint because of lack of information or a determination that the issues more appropriately fall under the jurisdiction of the court system. This situation is most common for major operations involving claimed riparian and/or pre-1914 water rights or for allegations of waste or unreasonable use of water or adverse impacts to public trust uses. Water right disputes, which are beyond the jurisdiction of the SWRCB, are civil matters. Disputes involving these types of rights should be resolved by the parties involved or by appropriate court action.

PROCESS FOR INVESTIGATION OF A COMPLAINT

The California Code of Regulations, Title 23, describes a procedure for investigating complaints alleging violation of the terms and conditions of water right permits or licenses issued by the SWRCB. The procedure specifies a series of steps, which do not usually result in a quick resolution of the complaint. The process normally takes a number of months, and in complex matters may require more than a year. The Division, therefore, strongly encourages all water users to discuss conflicts directly with the other party and to develop a mutually acceptable solution. This approach will resolve the problem much more quickly at the local level without SWRCB involvement. If the dispute cannot be mutually resolved, the party considering filing a complaint should call the Division (see telephone number on last page) to discuss the situation prior to filing a written complaint.

Filing a Complaint: All complaints must be submitted in writing. The Division will supply complaint forms upon request or they may be obtained from the Division's web page at:

www.waterrights.ca.gov

However, a letter is acceptable if the required basic information listed below is included. A copy of the complaint should be sent to each party being complained against.

Failure to provide basic information will cause delays in processing and may be cause for rejecting the complaint. The complainant must submit sufficient information, as described below, to establish that an illegal diversion, violation of a permit or license term, waste or unreasonable use of water, or injury to public trust resources is occurring or is threatened.

A complaint should include the following basic information:

1. Name, mailing address, and daytime telephone number of the complaining party (complainant).

2. Name and mailing address of the party against whom the complaint is being lodged (respondent). A daytime telephone number for the respondent is helpful.
3. The spring, stream, or other body of water that the respondent is diverting from should be named. If there is no name, identify the next larger named stream to which the diversion source is tributary.
4. The location of the respondent's diversion including the county in which it is located.

One method of providing this information is to provide the respondent's application, permit, or license number, or the Statement of Water Diversion and Use number for any riparian or pre-1914 appropriative right, if such a document exists. When this information is not available, the location of the respondent's diversion should be identified as accurately as possible. The Division uses United States Geological Survey 7.5-minute topographic maps for plotting purposes, and uses either the U.S. Land Survey (quarter-quarter, section, township, range, base, and meridian) or the California Coordinate System to identify the location of diversions. If the location of the respondent's diversion cannot be provided using this information, identify the assessor's parcel number (APN) on which the respondent's diversion is located or describe **in detail** how to travel to the diversion point referencing well known roads and landmarks that are likely to be shown on topographic maps. If Division staff are unable to locate the respondent's point of diversion, processing of the complaint will be delayed!

5. A description of the complaint.

Describe the circumstances, violation, adverse impact, or other condition that prompted the filing of the complaint. Any information which can be provided to assist in identifying the water rights held by the respondent is helpful. Also, any maps, photographs, sketches, or reports that would aid in understanding the complaint should be attached.

6. A description of any injury to the complainant or to public trust resources.

If the complaint involves an unauthorized diversion, violation of permit or license terms, diversion by a junior post-1914 diverter, or other adverse impact to the complainant, describe the details of the injury if not already included in the description of the complaint discussed in the above paragraph.

If the complaint involves adverse impacts to public trust resources, describe the particular injury that has occurred to specific fish, animals, plants, habitat, recreation, navigation, or other uses or users of the water and the evidence that suggests that the respondent is responsible for this injury.

7. A possible resolution of the complaint.

Describe any conditions, agreements, altered operations, or other suggestions that if agreed to by the respondent would resolve the complaint.

8. Details of the complainant's diversion and water rights if injury to the complainant's ability to divert water is claimed.

Identify the spring, stream, or other body of water from which the complainant is diverting. Also provide the location of the point of diversion, the county that the diversion is located in, the complainant's assessor's parcel number, and a description of where the water is used and what it is used for, and list the claimed right(s) that the diversion is being made under (give the application, permit or license number; the Statement of Water Diversion and Use number for any riparian or pre-1914 appropriative right; the notice date of any pre-1914 appropriative right; a reference to any court decision covering the diversion; or an explanation of any diversion of percolating groundwater).

The complainant is responsible for submitting sufficient information to show that the condition or situation being complained against in fact exists and that a violation, injury, damage, misuse, adverse impact, secondary effect, or other unanticipated result is occurring or threatened. Detailed studies and reports are not normally necessary to file a complaint, although pertinent backup information can assist Division staff in processing the complaint. As a minimum, the following information should be incorporated into the complaint for the various types of complaints:

- For complaints involving a violation of permit or license terms, the specific term(s) in question should be identified and the current actions or inactions of the permittee or licensee should be included in the description of the complaint. Supplying as much of the information requested on the Division's complaint form as possible is helpful for this type of complaint.
- For complaints involving unauthorized diversions, it is important to describe the location of the respondent's diversion as accurately as possible so that it can be researched in the Division's records.
- For complaints regarding waste or unreasonable use of water, it is essential that the complainant identify the respondent's diversion and submit appropriate hydrological, environmental, economic, social, energy related, or other data that indicates that the specific diversion or diversion facility, or operation, constitutes a waste or unreasonable use of water. The SWRCB will not normally investigate complaints that are vague or general in nature.
- For complaints involving adverse impacts to public trust resources, sufficient information should be submitted to identify the resources being harmed, how the respondent's diversion or operation is harming the resource, what level of resource existed prior to the diversion or operation as compared to current levels, and what alternatives exist that would protect or restore the resources.

Answer to the Complaint If the Division determines that the complaint is not within the jurisdiction of the SWRCB, or if insufficient information is submitted to further process the complaint, the complainant will be notified within about 30 days after the complaint is received. If the Division finds sufficient basis to process the complaint, the other party (respondent) will be sent a copy of the complaint and will be asked to complete a form answering the allegations in the complaint. Generally, 15 days will be allowed to return this form, although a longer period may be allowed for complex complaints. Not submitting an answer to a complaint, or submitting incomplete or vague information, may lead to a delay in processing the complaint but will NOT lead to rejection of the complaint.

Analysis of the Complaint Following receipt of the answer to the complaint, Division staff will review the information supplied by the parties, along with any information already on file, to determine what action, if any, is appropriate. If the complaint can not be processed further, the parties will be notified. If it appears that there is sufficient basis to continue processing the complaint, the Division may conduct a field investigation or the SWRCB may schedule a hearing to gather information or may directly refer the matter to the Attorney General resulting in one or more of the actions listed under "Possible Actions" below. The Division may also contact other agencies (e.g. Department of Fish and Game) to obtain additional information and/or recommendations. In special cases, the Division may hold a public workshop to gather information in conjunction with or instead of conducting a field investigation.

Report of Investigation and Staff Recommendations Following the conclusion of the investigation, the Division will prepare a letter of findings which may include recommended actions to be taken by one or more of the parties involved in the complaint. A staff report of investigation may also be prepared which includes a discussion of relevant background information; geologic, hydrologic and/or engineering analyses; and recommendations for further action. The Division findings, along with any staff report that may be prepared, will be sent to all parties involved in the investigation. For a routine complaint, this should take place within approximately nine months or less from receipt of the complaint. If processing of the complaint is not complete within this period, a status report will be sent to all parties involved. This will be updated on a yearly basis thereafter until the process is complete or has been terminated.

For those few cases in which the SWRCB holds a public hearing instead of a Division investigation, the findings and resolution of the complaint would normally consist of an order adopted by the SWRCB at a regularly scheduled monthly meeting.

Hearing If any party to the complaint disagrees with the Division's analysis or actions, the party may request a hearing before the SWRCB. Each request is evaluated based on the information provided by the requesting party and by Division staff. If the request is granted and a hearing is held, the SWRCB will adopt an order, at a regularly scheduled monthly meeting, identifying appropriate actions to be taken.

POSSIBLE ACTIONS

The following actions may be taken in response to a complaint.

- **Dismissal of the Complaint** – A complaint may be dismissed if the facts don't justify action by the Division or the SWRCB, or if the dispute is outside the SWRCB's jurisdiction.
- **Fines** – There are two types of fines which may be levied against a party who diverts water in violation of the Water Code. The SWRCB may issue administrative civil liabilities in an amount up to \$500 per day against anyone who diverts water without a proper water right, or the SWRCB may request that the Attorney General institute action for injunctive relief and/or collection of damages in the superior court of the county where the diversion or use is occurring or is threatened.
- **Referral to the Attorney General** – The diversion of water without a proper water right is a trespass against the state. The SWRCB may refer any party who is diverting without a proper water right to the Attorney General for the filing of a court action against the party to enjoin the diversion.
- **Revocation of Permit or License** – The SWRCB may issue an order revoking a permit or license held by any party who fails to comply with the terms and conditions of the permit or license or fails to comply with a previous order issued by the SWRCB. Such revocation can occur only after notice and opportunity for a hearing before the SWRCB.

- SWRCB Order on Other Water Rights – The SWRCB may issue an order requiring diverters and/or water users to take specific actions. This process would normally be utilized if the offender has or claims water rights which are not covered by a permit or license under the SWRCB's immediate jurisdiction; for example, complaints relating to riparian or pre-1914 rights. Such order would most likely be issued after notice and opportunity for hearing, or after a hearing upon the SWRCB's own motion.
- Cease and Desist Order – A Cease and Desist Order may be issued when a party: 1) undertakes an unauthorized diversion pursuant to Water Code Section 1052; 2) violates any term or condition of a permit, license, certification, or registration issued by the SWRCB; or 3) violates any decision or order of the SWRCB regarding waste, unreasonable use, or unreasonable method of diversion. A "Notice of a Cease and Desist Order" is provided along with an opportunity to request a hearing. If a request for hearing is not submitted within 20 days from the date of receipt of the notice, the SWRCB may issue a Cease and Desist Order without further notice. Failure to comply with the adopted order may result in the imposition of Administrative Civil liabilities of up to \$1,000 per day.

COST

There is no cost to the parties for the Division's investigation of water right complaints. As indicated above, however, fines could result.

OTHER AGENCIES

Several other agencies also have authority to take action on water related disputes. The following agencies should be contacted when appropriate:

- Department of Fish and Game
- Department of Health Services
- Regional Water Quality Control Board
- Department of Water Resources, Division of Safety of Dams
- Department of Water Resources, Watermaster Services
- County and other local agencies
- Local water districts

FOR MORE INFORMATION

If you would like more information, please contact the Division of Water Rights at:

State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000

Info: (916) 341-5300

FAX: (916) 341-5400

Web: <http://www.waterrights.ca.gov>